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VINCENT TOOMEY, Tenant/Petitioner, v. ALVIN L. AUBINOE, INC. Housing Provider/Respondent	Case No.: RH-TP-06-28581 *In re:* 4801 Connecticut Avenue, N.W. Unit No. 622

FINAL ORDER

I. Introduction

On March 31, 2006, Tenant/Petitioner Vincent Toomey filed Tenant Petition ("TP") No. 28,581 with the Rent Administrator, asserting that Housing Provider Alvin L. Aubinoe, Inc., violated the Rental Housing Act of 1985 with respect to Tenant's rental unit, Apartment 622, at 4801 Connecticut Avenue, N.W. (the "Housing Accommodation"). The petition charged that: (1) the rent increase was larger than the amount of increase which was allowed by any applicable provision of the Rental Housing Act; (2) a proper 30 day notice of rent increase was not provided before Tenant's rent increase became effective; (3) Housing Provider failed to file the proper rent increase forms with the RACD; (4) the rent being charged exceeds the legally calculated rent ceiling for the unit; (5) the rent ceiling filed with the RACD for the unit is improper; (6) a rent increase was taken while the unit was not in substantial compliance with the District of Columbia Housing Regulations; (7) services and/or facilities provided in connection with the rental of the unit had been substantially reduced; and (8) retaliatory action had been directed

against Tenant by Housing Provider for exercising Tenant's rights in violation of Section 502 of the Rental Housing Act.

The parties appeared for a hearing on February 6, 2007. Tenant was represented by counsel, testified on his own behalf, and submitted 12 exhibits, all but one of which were received in evidence.[1] Housing Provider was represented by counsel and presented its case through the testimony of Cynthia Hoes, property manager for the Housing Accommodation, and Rodney Wright, a former maintenance superintendent in the building. Housing Provider submitted 24 exhibits, all of which were received in evidence.

For reasons set forth below, I find that Tenant has not sustained his burden of proof with respect to any of the eight claims alleged in the tenant petition. Therefore, the tenant petition will be dismissed.

II. Findings of Fact

Tenant, Vincent Toomey, is a long time resident of the Housing Accommodation. He leased his rental unit on April 21, 1982.

Tenant testified that he began experiencing problems in the apartment about fifteen years prior to the hearing when paint started to bubble due to wet plaster. An answer and counterclaim filed in an action in the Superior Court of the District of Columbia Landlord/Tenant Branch in February 2005 dated these problems earlier. In that filing Tenant complained of "mildew, loose and peeling paint, crumbling walls, rusted bathroom medicine cabinet, hole under sink, holes in kitchen and other walls, damaged kitchen cabinets," and other discrepancies that existed "[s]ince

[1] A list of exhibits is contained in the Appendix to this Final Order.

moving into the premises." Respondent's Exhibit ("RX") 226. I therefore find that these conditions existed as of March 31, 2003, three years before the tenant petition was filed.[2]

On January 1, 2004, Tenant sent a letter to Tripp Aubinoe of Aubinoe Management Co., complaining of "two large holes in the kitchen wall," cockroach infestation, "cut shelves out of the kitchen cabinets," and a "lousy job" of painting the kitchen following plumbing repairs. Petitioner's Exhibit ("PX") 111. Housing Provider did not deny receipt of the letter or that Mr. Aubinoe was an appropriate person with whom to lodge complaints. I find, therefore, that Housing Provider was given notice of the conditions described in the letter as of January 1, 2004 — holes, defective paint, broken kitchen cabinets, and cockroaches.

On October 22, 2004, Tenant sent Housing Provider a memo identifying defects in the kitchen and bathroom cabinets that needed replacing. PX 112. In December, 2004, Housing Provider replaced the kitchen cabinets and kitchen sink, plugged the holes in the wall, replastered the kitchen, and replaced the kitchen floor.

Although Tenant testified that he also complained of other conditions in the apartment, particularly mildew, he introduced no written record of these complaints and he was unable to give specifics about the date of the complaints, to whom they were made, or the particular matters that were involved.[3] Moreover, Tenant's recollection of events concerning the state of his apartment was uncertain. I find, therefore, that Tenant has not proven that he gave Housing

[2] Because the Rental Housing Act bars Petitioner from complaining about conditions that existed more than three years prior to filing the tenant petition, the condition of the apartment prior to that time is immaterial. *See* discussion in Section III(d) *infra*.

[3] Tenant's answers to interrogatories filed in the action in the Superior Court of the District of Columbia listed ten written communications that purportedly informed Housing Provider of housing code violations in Tenant's apartment between December 1, 2003, and December 29, 2004. RX 227 at 6, ¶ 3. None of these documents was discussed or offered into evidence.

Provider notice of problems in the apartment other than the conditions described in the January 1, 2004, letter and in his October 22, 2004, memo.[4]

Following the repairs to the kitchen, Tenant continued to complain about problems in the bathroom. Photographs introduced into evidence showed extensive paint peeling in the bathroom. PXs 101, 102, 103, 104, 105, 108. The medicine cabinet in the bathroom was rusted through and needed replacing. PX 109. Faucets in the bathroom accumulated mold. PX 110. Although the photographs were taken shortly before the hearing, I accept Mr. Toomey's testimony that these problems existed prior to filing the tenant petition. In the absence of more specific evidence as to the dates during which Tenant experienced problems with the bathroom, I find that the rusted medicine cabinet existed from at least October 22, 2004, when Mr. Toomey complained of the rusted cabinet in his memo, PX 112, and the peeling paint existed from at least April 2005, when he complained of peeling paint in the bathroom in answers to interrogatories filed in an action for possession in the Superior Court of the District of Columbia Landlord/Tenant Branch, RX 227 at 4, No. 14.

In December, 2004, while Tenant's kitchen was being repaired, two workmen entered Tenant's apartment without notice using the Housing Provider's key. Mr. Toomey was startled and upset by this intrusion. Shortly afterwards he installed a deadbolt lock on the door. Tenant refused repeated demands by Housing Provider for a key to the lock and refused to allow workmen to enter the apartment except when he was present. RXs 208, 209, 216, 219.

[4] Tenant arranged for an independent inspector to inspect his apartment in September 2006. The inspector prepared a report, which was not received in evidence, and told Tenant that the apartment contained mold and mildew. While the inspector's findings lend some weight to Tenant's testimony that the apartment contained mildew before the tenant petition was filed, they have no bearing on the issue of whether Tenant gave Housing Provider adequate notice of the problem or an adequate opportunity to access the apartment to cure the problem.

Before Housing Provider made the repairs to Tenant's kitchen, Tenant stopped paying rent to protest the condition of his apartment. Housing Provider then filed an action for possession in the Superior Court of the District of Columbia Landlord/Tenant Branch. In August 2005 the parties attended a mediation in which Tenant and Housing Provider agreed to conduct a joint inspection of the rental unit to determine what further repairs might be required. RX 203. The inspection was originally scheduled for August 12, 2005, RX 201, but was postponed at Tenant's insistence. RXs 203, 204, 205, 206. I credit the testimony of Housing Provider's property manager, Cynthia Hoes, that, when an inspection was finally conducted on September 15, 2005, Tenant only allowed her access to the bathroom and kitchen. Doors to the other rooms were closed.

Following the September 15, 2005, inspection, Housing Provider attempted to make further repairs to the rental unit in order to install a new medicine cabinet in the bathroom, install new blinds, and paint the bathroom and other areas where the paint was peeling. I accept the testimony of Ms. Hoes, and Rodney Wright, Housing Provider's maintenance engineer, that Tenant frequently refused access to the apartment when Housing Provider attempted to schedule repairs.

Tenant's uncooperative attitude was also a serious impediment to Housing Provider's attempts to provide extermination services to Tenant's unit. I credit the testimony of Ms. Hoes and Mr. Wright that Tenant allowed piles of boxes, papers, and debris to accumulate in his apartment creating an unsanitary condition that attracted roaches. This condition was documented in a memo of a February 21, 2006, inspection performed by one of Housing Provider's maintenance workers who described "boxes and papers stacked along the walls" and "roaches running through out [sic] the apartments." RX 218.

Although Housing Provider had contracted with an exterminator to make weekly visits to the building, Tenant refused to schedule visits from the exterminator. Tenant also failed to respond to Housing Provider's frequent attempts to schedule an exterminator. On more than one occasion, Tenant refused to admit exterminators who requested access to the apartment. RXs 206, 210, 211, 221, 225. In May 2006, following the filing of the tenant petition, Mr. Toomey was so abusive to one technician that the exterminator wrote a note describing the incident asserting that: "I will not continue to go up there anymore." RX 222.

Tenant's hostility was not reserved for exterminators alone. On January 25, 2006, the police were called in response to building manager Angela Evans's complaint that Mr. Toomey assaulted her. RX 213. In court, Tenant consented to a stay away order requiring that all communications concerning apartment maintenance and repair be in writing. RX 214.

On February 28, 2006, attorneys for Housing Provider served a letter on Tenant demanding that he cure certain defaults within 30 days or vacate the apartment. The letter demanded that Tenant cure the defaults by maintaining the premises in a clean and sanitary condition, providing Housing Provider with a key to the deadbolt lock, and providing Housing Provider reasonable access to the premises to exterminate roaches and make repairs. RX 216.

Tenant filed the present tenant petition on March 31, 2006. Following the filing he continued to refuse to furnish a key to the deadbolt or to cooperate in arranging access to his apartment. RXs 220, 221, 222, 225. In April 2006 Housing Provider filed a complaint for possession in the Superior Court of the District of Columbia Landlord/Tenant Branch. RX 215.

In light of this evidence in the record, I make the following findings concerning the condition of Tenant's apartment and Housing Provider's treatment of those conditions:

(1) Tenant experienced a significant reduction in services and facilities from January 1, 2004, through December 15, 2004, as a consequence of holes in the kitchen wall, peeling paint, falling plaster, and damaged kitchen cabinets. Housing Provider was on notice of these problems but did not remedy them until December 2004.

(2) Beginning in December 2004, Tenant impeded Housing Provider's ability to gain access to the apartment by installing a deadbolt lock, refusing to give Housing Provider a key, and refusing to cooperate with Housing Provider in arranging times when workmen could access the apartment to inspect it and to make repairs. Although Tenant complained of substandard conditions in need of repair after December 2004, specifically problems of peeling paint, mold, and mildew in the bathroom, and a rusted medicine cabinet in the bathroom, Tenant did not cooperate with Housing Provider to enable repairs to be made promptly.

(3) From January 1, 2004, through the date the tenant petition was filed, Tenant's apartment was infested with roaches. This problem was largely of Tenant's own making because Tenant allowed papers and boxes to accumulate in his apartment creating conditions in which roaches flourished. Moreover, Tenant made no effort to take advantage of Housing Provider's weekly extermination service or to allow exterminators access to his unit. I find that the roach infestation in Tenant's apartment was caused by Tenant's own negligence and that Tenant did not give Housing Provider a reasonable opportunity to cure the problem.

The record contains no evidence of the amount of either the rent or the rent ceiling of Tenant's rental unit at the time the tenant petition was filed or in the three years preceding the filing.[5] There was also no evidence concerning any rent increases for the rental unit.

[5] A post-hearing submission, Tenant/Petitioner's Response to Housing Provider's Motion To Dismiss and Closing Argument, stated that Tenant has been paying $700 per month into the

III. Conclusions of Law

A. Jurisdiction

This matter is governed by the Rental Housing Act of 1985 (the " Rental Housing Act" or the "Act"), D.C. Official Code §§ 42-3501.01 – 3509.07, the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. Official Code §§ 2-501 – 510, the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR 2800 – 2899, 1 DCMR 2920 – 2941, and 14 DCMR 4100 – 4399. As of October 1, 2006, the Office of Administrative Hearings ("OAH") has assumed jurisdiction of rental housing cases pursuant to the OAH Establishment Act, D.C. Official Code § 2-1831.03(b-1)(1).

B. Tenant's Claim Concerning Rent Increases

Four of the claims in the tenant petition relate to alleged rent increases. Tenant checked boxes on the tenant petition asserting that the rent increase was larger than the amount of increase which was allowed by any applicable provision of the Rental Housing Act, that a proper 30 day notice of rent increase was not provided before Tenant's rent increase became effective, that Housing Provider failed to file the proper rent increase forms with the Rent Administrator, and that a rent increase was taken while the unit was not in substantial compliance with the District of Columbia Housing Regulations. Tenant did not testify concerning any rent increase at

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Registry of the Superior Court of the District of Columbia because of Housing Provider's eviction action. Tenant gave no testimony concerning his rent, however, and none of the documents received in evidence say anything about the amount of the rent at any relevant time. Statements by counsel are not evidence. *Sawyer Prop. Mgmt. v. Mitchell*, TP 24,991 (RHC Oct. 31, 2002) at 6. Tenant's Answers to Interrogatories, filed in the action in The Superior Court of the District of Columbia, made reference to "[m]onthly rents according to Department of Consumer and Regulatory Affairs records," ranging from $311 in 1985 to $711 in 2004. RX 227 at 8, ¶ 7. Tenant made no reference to these rents in his testimony and did not introduce the DCRA records into evidence.

the hearing. Nor did Tenant or Housing Provider introduce any documents to show that a rent increase was implemented.

In rental housing cases "the proponent of an order shall have the burden of establishing each fact essential to the order by a preponderance of the evidence." OAH Rule 2932.1, 1 DCMR 2932.1. *Cf.* D.C. Official Code § 2-509(b) ("In contested cases . . . the proponent of a rule or order shall have the burden of proof.") Here, it was Tenant's burden to prove that Housing Provider imposed an illegal rent increase. Because there is no evidence in the record of any rent increase at all, Tenant's four claims concerning rent increases are dismissed.

C. Tenant's Claims Concerning the Rent Ceiling

Two of the claims in the tenant petition allege violations of the Rental Housing Act relating to the rent ceiling. Tenant asserts that the rent being charged exceeds the legally calculated rent ceiling for the unit and that the rent ceiling filed with the RACD for the unit is improper. These claims also must be dismissed because Tenant failed to sustain his burden of proof. He did not introduce any records from the Rent Administrator or other evidence to establish the rent ceiling for his apartment.

D. Tenant's Claims Concerning Reduction in Services and Facilities

The focus of Tenant's presentation at the hearing was his claim that services and facilities provided in connection with the rental of his apartment were substantially reduced. Here, again, it was Tenant's burden to establish that the services and facilities were reduced. Moreover, to establish a claim for reduction in services and facilities "the tenant is required to present competent evidence of the existence, duration, and severity of the reduced services or facilities." In addition, when the reduction occurs inside the rental unit, the tenant must "give the housing provider notice of the allegations that constitute violations of the housing code." *Hudley v. McNair*, TP 24,040 (RHC June 30, 1999) at 11 (citing *Hall v. DeFabio*, TP 11,554 (RHC Mar. 6, 1989).

Housing Provider moved to dismiss the tenant petition at the hearing and in a post-hearing submission on the grounds that "the Rental Housing Act's three year statute of limitations, found at D.C. Code § 42-3502.06(e) (2001 ed.), bars a tenant from petitioning to invalidate a rent increase or rent ceiling by relying on housing code violations or service reductions which commenced over three years prior to the filing of the petition." Housing Provider's Mem. in Support of Oral Mot. To Dismiss and Closing Argument at 1-2. Tenant disputes this assertion, arguing that "[u]nder relevant caselaw, a tenant is afforded the right to recover for housing violations that continue past the date set by the statute of limitations." Tenant/Petitioner's Response to Housing Provider's Mot. To Dismiss and Closing Argument at 1.

In support of its motion to dismiss, Housing Provider cites the Rental Housing Commission's decisions in *Borger Mgmt., Inc. v. Warren*, TP 23,909 (RHC June 3, 1999), and

Peerless Prop. v. Hashim, TP 21,259 (RHC Oct. 26, 1992). Neither case is precisely analogous to the facts here. In *Peerless*, the Commission held that the statute of limitations barred the tenant from contesting the Housing Provider's failure to provide a refrigerator more than three years before the tenant filed his claim. In *Borger*, the Commission held that a tenant could not protest the absence of a laundry room and hot water that commenced more than three years before the tenant petition was filed. Neither case involved repairs or maintenance to the tenant's apartment or continuing allegations of housing code violations.[6]

The day after issuing its decision in *Borger,* the Commission issued a decision in *Redmond v. Majerle Mgmt., Inc.*, TP 23,146 (RHC Jun. 4, 1999), a case that alleged ongoing violations of the housing code, including a roof that was leaking more than three years before the tenant petition was filed. Although the Commission did not address the statute of limitations issue explicitly, it decreased the tenant's rent ceiling to reflect the value of diminished services, and commenced the reduction on a date three years before the tenant petition was filed. *Id.* at 23. Thus, the Commission imposed a sanction for a reduction in services and facilities that originated before the date of the statute of limitations bar.

On appeal of the *Majerle* decision, the Court of Appeals addressed the statute of limitations issue explicitly. The Court observed:

> "Majerle's remaining arguments relating to the award for diminution in services and facilities can be resolved summarily. First, Majerle's argument that the statute of limitations bars recovery is unavailing. Though the housing code violations may have initially occurred more than three years before the tenant filed her complaint, the statute of limitations does not bar recovery for

[6] It is unclear whether the alleged lack of hot water in *Borger* was limited to the laundry room or applied to the rental unit itself. In any case, the tenant petition did not allege any violation of the housing code. *See Borger Mgmt., Inc. v. Warren,* TP 23,909 (RHC June 3, 1999) at 2.

> violations that continued past the cut-off date established by the statute of limitations."

Majerle Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 768 A.2d 1003, 1009, n. 13 (D.C. 2001).

Housing Provider argues that this observation is dictum because "it addressed an issue the landlord did not raise with the RHC." Housing Provider's Reply to Tenant/Petitioner's Resp. to Housing Provider's Mot. To Dismiss and Closing Argument at 2. But it is not dictum. The Court of Appeals was addressing the specific facts of the case before it and was responding to arguments that the housing provider had raised in the appeal. Accordingly, I conclude that the Rental Housing Act's statute of limitations, D.C. Official Code § 42-3502.06(e), does not bar Tenant's claim for reduction in services and facilities here.

Here Tenant introduced evidence of a reduction in services and facilities. While Tenant's evidence concerning the dates and nature of his notice to the Housing Provider was scanty, I have found that Tenant's facilities were reduced and Housing Provider was on notice of the reduction from January 1 through December 15, 2004, when Tenant's kitchen was repaired. Notwithstanding, I conclude, as set forth below, that Tenant has not proven that he is entitled to any remedy for this reduction under the Rental Housing Act.

Housing Provider's efforts to complete the repairs in Tenant's apartment following December 2004 were hampered because Tenant installed a deadbolt lock, refused to give Housing Provider a key, and did not respond to Housing Provider's requests for access. A tenant has an obligation to cooperate with the housing provider by granting reasonable access to the unit for repairs. *Russell v. Smithy Braedon Prop. Co.*, TP 22,361 (RHC July 20, 1995) at 7; *Offund v. American Security Bank*, TP 21,087 (RHC Jan. 11, 1990) at 6. *Cf.* D.C. Official Code

§ 42-3502.08(c) (a tenant who, following written notice, refuses to admit housing provider's employees to abate a housing code violation "will be considered to have waived the right to challenge the validity of the proposed [rent] adjustment for reasons that the rental unit occupied by the tenant is not in substantial compliance with the housing regulations"). Therefore, I conclude that Tenant has failed to prove any claim for reduction in services and facilities following December 2004.

E. Tenant's Claim for Retaliation

Tenant's final claim is that retaliatory action had been directed against Tenant by Housing Provider for exercising Tenant's rights in violation of Section 502 of the Rental Housing Act. To prevail on a claim for retaliation, Tenant must show that the Housing Provider's act was provoked by Tenant's exercise of rights under the Act. I conclude that Tenant has not established a link between any exercise of these rights and Housing Provider's decision to terminate the tenancy.

In his trial testimony Mr. Toomey made no specific mention of retaliation. But there was uncontested evidence that Housing Provider threatened Mr. Toomey with eviction. On February 28, 2006, Housing Provider served Tenant with a notice to vacate or cure, demanding that he clean up the apartment and furnish Housing Provider with a key to the deadbolt lock or vacate the apartment. RX 216. Because Housing Provider threatened Tenant with eviction while legal action was pending and Tenant was complaining about housing code violations, we must consider whether the Rental Housing Act's presumption of retaliation applies. The Act prohibits a housing provider from taking "any retaliatory action against any Tenants who exercise any right conferred upon the Tenants by this chapter." Retaliatory action includes "any action or

proceeding not otherwise permitted by law which seeks to recover possession of a rental unit . . . ." D.C. Official Code § 42-3505.02(a). *See also* 14 DCMR 4303.3 ("Retaliatory action shall include . . . (a) Any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit.").

In turn, the Rental Housing Act establishes a presumption that an act to recover possession is retaliatory if it occurs within six months of certain prescribed Tenant actions:

> (b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if win the 6 months preceding the housing provider's action the tenant:
>
> (1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;
> (2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;
> (3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulations;
> (4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;
> (5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or
> (6) Brought legal action against the housing provider.

D.C. Official Code § 42-3505.02(b).

It is debatable whether any of Tenant's actions within the six months before Housing Provider served its notice to vacate or cure come within the Rental Housing Act's presumption of retaliation. But, even if we assume that Tenant's actions triggered a presumption of retaliation under the Act, I find that Housing Provider has rebutted the presumption by clear and convincing evidence. Clear and convincing evidence has been described by the District of Columbia Court of Appeals as "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Lumpkins v. CSL Locksmith, LLC*, 911 A. 2d 418, 426, n. 7 (D.C. 2006) (quoting *In re Dortch,* 860 A.2d 346, 358 (D.C. 2004)). Here, the Housing Provider's notice to vacate or cure related to Tenant actions that were violations of the lease and potentially violations of the housing code. *See* RX 216. Moreover, Housing Provider did not serve the notice until after Tenant had repeatedly refused to provide Housing Provider with a key to the deadbolt and repeatedly postponed inspections and appointments for repairs. RXs 201, 202, 203, 204, 205, 206, 208, 209. I conclude, therefore, that Housing Provider had legitimate reasons to demand that Tenant cure his lease violation or vacate the apartment. There is clear and convincing evidence that Housing Provider's notice to recover possession of the rental unit was not an act of retaliation.

F. Remedies

As the discussion above demonstrates, the only violation of the Rental Housing Act that Tenant established is a claim for reduction in services and facilities. However, Tenant cannot even prevail on this claim because he failed to submit any proof of either the rent for the apartment or the rent ceiling that applied during the time of his complaints. Evidence concerning both these elements is critical for this administrative court to impose any penalty under the Rental Housing Act.

Decisions of the Rental Housing Commission have repeatedly held that "[w]here the [administrative law judge] finds that the tenant's services have been reduced, the remedy is to reduce the rent ceiling, not the rent.[7] The tenant is entitled to a rent refund only to the extent that the rent charged exceeded the reduced rent ceiling." *Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005) at 12; *accord Redman v. Graham,* TP 24,681 (RHC July 1, 2004) at 10; *Kemp v. Marshall Heights Cmty. Dev.*, TP 24,786 (RHC Aug. 1, 2000) at 8; *Hiatt Place P'ship v. Hiatt Place Tenants' Ass'n*, TP 21,249 (RHC May 1, 1991) at 26. This interpretation is consistent with the plain language of the Rental Housing Act at the time the tenant petition was filed, which provided that: "Any person who knowingly . . . substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable . . . for the amount by which the rent exceeds the applicable rent ceiling . . . ." D.C. Official Code § 42-3509.01(a) (2005). Decisions of the Court of Appeals also support the Commission's interpretation. *See Majerle Mgmt. v. D.C. Rental Hous. Comm'n*, 768 A.2d 1003, 1007 (D.C. 2001) ("[t]he propriety of a particular rent charged by a housing provider can only be judged against the allowable rent ceiling") (quoting *Kennedy v. D.C. Rental Hous. Comm'n,* 709 A.2d 94, 99 (D.C. 1998); *Afshar v. D.C. Rental Hous. Comm'n*, 504 A.2d 1105, 1108 (D.C. 1986) (holding that, under the Rental Housing Act of 1980, a landlord would not have to pay a rent refund for a substantial reduction in services "unless the rent actually charged exceeds the rent ceiling").

Here Tenant failed to submit any evidence as to the amount of either the rent or the rent ceiling for his apartment. It is impossible, then, to determine whether Tenant may be entitled to

[7] Rent ceilings were abolished by the Rent Control Reform and Amendment Act of 2006, which amended the Rental Housing Act of 1985 to provide that permissible rent ceilings would be based on the present rent charged for a housing unit rather than the rent ceiling. *See* 53 D.C. Reg. 4489 (Jun. 23, 2006). The amendment was effective as of August 5, 2006, and therefore does not affect the Tenants' petition here. *See* 53 D.C. Reg. 6688 (Aug. 18, 2006).

a refund under the Act as it applied at the time the tenant petition was filed. Tenant has failed to sustain his burden of proof.

Tenant argues that a provision of the Rental Housing Regulations permits a reduction in rent rather than the rent ceiling as a remedy for reduced services or facilities:

> If related services or facilities at a rental unit or housing accommodation decrease by accident, inadvertence or neglect by the Housing Provider and are not promptly restored to the previous level, the housing provider shall promptly reduce the rent for the rental unit or housing accommodation by an amount which reflects the monthly value of the decrease in related services or facilities.

14 DCMR 4211.6.

Even if this regulation were applicable here, Tenant would still have failed to sustain his burden of proof because there was no evidence as to the amount of the rent for the apartment.[8] But I conclude that the regulation is not controlling. It is contrary not only to the plain language of the Rental Housing Act, but also to a well-established line of decisions from the Rental Housing Commission and the Court of Appeals that hold explicitly that it is the rent ceiling rather than the rent that must be reduced to compensate for reduced services. It is also significant that 14 DCMR 4211.6 is part of a section of the regulations that applies to petitions for changes in related services of facilities. *See* 14 DCMR 4211. The tenant petition here is governed by a different section, 14 DCMR 4214, which does not permit a reduction in the rent.

Because Tenant failed to prove any of the claims alleged in the tenant petition, it follows that Tenant has failed to prove either bad faith, as a basis for treble damages, or willfulness as a basis for a fine. A finding of bad faith requires proof that Housing Provider acted out of "some

[8] *See* n. 5 *supra.*

interested or sinister motive" involving "the conscious doing of a wrong because of dishonest motive or moral obliquity." *Third Jones Corp. v. Young,* TP 20,300 (RHC Mar. 22, 1990) at 9. Fines, for a willful violation of the Rental Housing Act, require a determination that the Housing Provider intended to violate the law and possessed a culpable mental state. *Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n*, 505 A.2d 73, 76, n. 6 (D.C. 1986). Moreover, the Rental Housing Commission has held that a fine may not be imposed as a remedy for a claim of reduction in services. A rent refund is the only remedy permitted by the statutue. *Schauer v. Assalaam*, TP 27,084 at 14-15 (RHC Dec. 31, 2002) (citing D.C. Official Code § 42-3509.01(a) (2001).

In sum, because Tenant failed to submit any evidence as to either the rent or the rent ceiling for his apartment, it is impossible to impose a penalty or fashion a remedy for the reduced services and facilities. Moreover, Tenant's refusal to permit access to his apartment and failure to keep the apartment clean contributed significantly to the conditions he complains of. The tenant petition will therefore be dismissed.

IV. Order

Accordingly, it is this **4th** day of **March, 2008:**

ORDERED, that this case is **DISMISSED WITH PREJUDICE;** and it is further

ORDERED, that any party may move for reconsideration of this Final Order within ten days under OAH Rule 2937, 1 DCMR 2937; and it is further

ORDERED, that the appeal rights of any party aggrieved by this Final Order are set forth below.

_____/s/_____
Nicholas H. Cobbs
Administrative Law Judge